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SUPREME COURT, U.S.

No. 03-984

In The

Supreme Court of the United States

Richard A. Balser and Corinne L. Balser
Petitioners

v.

United States Department of Justice

And

The Office of the United States Trustee
Respondents

On Petition For Writ Of Certiorari

To The Ninth Circuit Court Of Appeals

PETITION FOR REHEARING

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PETITION FOR REHEARING

Introduction: The Petitioners herein respectfully move this court for an Order (1) vacating its denial of the Petition for Writ of Certiorari, entered on May 17, 2004, and (2) granting the Petition. As grounds for this Motion, Petitioners herein state the following nine significant points:

1. Petition Seeks Retribution, Not Damages:

Petitioners (Appellants) first want to respectfully address the mischaracterization of this case by Respondents (Defendants) as being a claim for "damages" and "monetary exactions." It is not. This case is a claim for restitution of net asset values near $5,000,000 taken from the Petitioners as *victims* of alleged, but yet unproven, fraud, collusion, perjury, misrepresentation to the court, violation of due process, admitted conflicts of interest, denial by court action of Petitioner's right to perfect an appeal and a lack of proper representation for an appeal, among other numerous violations of statutory and contractual law. There has been no defense offered otherwise. This Court has the power to recover all costs of restitution, including the government's own costs should it choose so, for wrongdoings from those perpetrators, within the government or private enterprise, who shared in the distribution of the $7,752,000 sale of Petitioners' assets.

2. Case Raises Issues of First Impression:

The issues raised are several of *first impression* in the Ninth Circuit, concerning the sovereign immunity of the Department of Justice and the Office of the United States Trustee. The allegations to which these issues relate represent serious failures within both the Executive and Judiciary branches of government as to administering and upholding constitutional rights "for a redress of grievances;" deprivation "...of life, liberty, or property, without due process of law;" "...the right of trial by jury...;" and "...the equal protection of the laws."

Recent criticisms by members of the legislature reportedly may have contributed to the recent creation of a committee to evaluate the judiciary's discipline system with appointments by Chief Justice William Rehnquist (reported in the Legal Times on June 1, 2004). In any event, in the case presented hereby, the alleged misinterpretation and misapplication of a clear statute regarding the abrogation of sovereign immunity serves to shield Defendants from accountability. The conclusions reached are puzzling to Petitioners and may well deserve better clarification of intent by the legislature. Petitioners hereby request that the opportunity to obtain such clarification be granted by this Court by its deferring the filing of denial, if the petition is not otherwise to be granted at this time.

3. Sovereign Immunity Clearly Abrogated:

It is imperative that the Court take further note that reliance upon sovereign immunity to shield the Department of Justice, the Office of the United States Trustee, or even the United States Trustee (when the latter is NOT "*...acting as trustee in a case")* might well be perceived as an executive and judiciary disregard of legislative intent beyond the line of debatable interpretation. The law reads one way. But the Department of Justice and Judiciary, with the ill-advised consent of the Courts below, have acted to use immunity as a shield covering not just DOJ administrative officers of the court but even the responsible departments from being held accountable. The response of the Solicitor General is no better, in that it tends to divert attention away from the responsible government agencies listed as Defendants to only parrot the weak and incorrect interpretation of 11 U.S.C. § 106(a), which clearly abrogates sovereign immunity in this case as to the Defendants. (Petitioners are prepared to show at trial that this case relates to 22 of the 60 specific sections under which Respondents disavow relativity, any one of which would thereby abrogate immunity.)

4. Accountability Due By Respondeat Superior: The world has witnessed what a sense of immunity from being held accountable for the adverse consequences of The War on Terror, from the invasion of Afghanistan to Iraq, is premised upon the United States seeking to hold those responsible to also be held accountable. Clearly, our national commitment seeks to enforce justice through respondeat superior policies. The Supreme Court is asked to follow the same policy in this case. Furthermore, the state itself applies respondeat superior accountability for the adverse consequences of wrongful acts by its own employees? Should not the federal Court recognize and respect local State regulations similarly?

5. Immunity Compromises A Redress of Grievances: The one institution capable of most directly arresting the infectious spread of such cancer-like arrogance of immunity within our government and industry is the Supreme Court of the United States. The use of sovereign immunity, or judicial immunity, or qualified, discretionary or absolute immunity should not preclude an ultimate accountability for the impacts of wrongful behavior. Responsibility to grant restitution should remain accessible at some level above those protected individually by immunity in their work The Court is asked to preserve some avenue for victims of wrongdoing to achieve the redress of grievances, restitution or relief from the consequences of either criminal or civil unjust acts.

Ultimately, any application of immunity must be well confined to within careful limits defined by due process, which was found lacking in the present case. But even then provisions for a respondeat superior approach should be applied in the event of adverse consequences which result from unjust or unlawful behavior in the implementation of existing laws. Certainly, the United States government looks to respondeat superior in its pursuit of justice on law enforcement actions conducted by its various enforcement agencies. It is only appropriate that the officer or office or

department above should be accountable for the adverse consequences of wrongful behavior by subordinates within the government. In any event, victims, such as the Petitioners herein, should not be left without an effective avenue for a redress of grievances or hope of restitution where wronged.

6. New Crime Victims' Rights Act Lists Restitution:

On April 22, 2004, the Congressional Record reported that Senate Bill 2329, cited as the "Crime Victims' Rights Act" the (CVRA) passed the Senate by a vote of 96 to 1, with but three senators not voting. The Court should note this strong bipartisan support by the legislature, as the issue reflects directly upon the Petitioners' related pleadings. For the purpose of this new proposed Act "the term 'crime victim' means a person directly and proximately harmed as a result of the commission of a Federal offense." Certainly, the Petitioners have been harmed by their loss of $5,000,000 through a series of wrongdoings including alleged crimes listed in the Petition For Writ of Certiorari. Petitioners expect to confirm at trial that they are victims in the complete sense of the term. The Department of Justice and the Judiciary, to this point in the case of Balser Vs Dept. of Justice and Office of the United States Trustee, have failed us. The appropriate pathway to restitution and redress of this grievance is through this Court's eventual granting of the Petition for Writ of Certiorari.

7. Restitution by Due Process And Good Legislation:

Petitioners assert that they have a right to restitution under the "Victims' Rights and Restitution Act of 1990" which also provides that if a court does not offer restitution then it must state on the record the reasons why restitution was not ordered. If this Court does not grant the Petition For Certiorari then Petitioners would need to seek alternative routes through the complex legal systems to achieve redress and restitution under existing (or proposed) Victims Rights legislation. The present case includes an option by which the Court can assure both that restitution be paid to Petitioners while the costs therefore to the

Federal government and its agencies can be recovered from the private industries and their legal representatives who were at the base and most profited by fraud, misrepresentation to the court, conspiracy, conflict of interests, and an obstruction of justice. This Court is requested to grant the Petition For Writ of Certiorari so that this nine year complex legal struggle can be justly consummated. Certainly, additional legislation is necessary to correct both bankruptcy statutes and victims rights to restitution to better clarify existing laws and protections. However, these changes to preserve accountability cannot be effected within the current legislative term.

8. Petition Strives to "Set Bar" to Correct Wrongdoings in Federal Courts:

Petitioners, having been deprived of property by "unreasonable governmental interference," 360 U.S. 492, necessarily is entitled to be made whole for the resulting damages. Dismissal of this case on wrongful interpretations of the applicability of sovereign immunity toward either the Department of Justice or the Office of the United States Trustee, or even toward the United States Trustee under Chapter 11 Bankruptcy, does not erase the deprivations of property rights or eliminate the obligations of these defendants to be held accountable and to make, or see to the making of by others, the restitution for the losses suffered.

The importance and substantiality of the questions presented for review have not been denied. Nor have the allegations of wrongdoings and unlawful actions by the officers and agents of Defendants been controverted. The only defense is that the District Court judge assumed that the agencies named as defendants are to be correctly represented as if their fiduciary obligations and responsibilities were transferable to a Chapter 7 type of private trustee. However, this is despite this case being a Chapter 11 with only an examiner, but no private trustee appointed to replace the Petitioners as Debtor-in-Possession. This gross misinterpretation was defended by the

Ninth Circuit Court of Appeals and recently even by the Solicitor General. It should still not preclude restitution.

9. Conclusions - - Plenary Review is Justified:

Petitioners consider this case to be significant in that the United States Trustee primarily performs administrative acts, as in making appointments as for the hiring of the examiner for limited responsibilities, without noting the conflict of interest in the Trustee's recommendation for approval submitted for confirmation by the bankruptcy court. But then even a judge can be denied immunity as in Forester v White, 44 U.S. at 224, wherein justice O'Connor offered that the court "has generally been quite sparing in its recognition of claims to absolute official immunity," holding that the actions of Judge White in firing Ms. Forrester were not entitled to judicial immunity. The court refused to apply even quasi-judicial immunity. Nor should it apply in the present case during hiring, especially when the hired examiner's working relationships with a buyer's attorney being also the examiner's employee on another case violates statutory requirements for selection of a disinterested candidate.

Wherein the U.S. Trustee supported the expansion of the Examiner's authority to execute the sale of Petitioners' properties without notice or hearing, and thus assumed a fiduciary duty to preserve the estates, the Supreme Court in Harlow et al v Fitzgerald, 457 U.S. 819 made clear that "...a reasonably competent public official should know the law governing his conduct."

As to the Department of Justice and Office of the United States Trustee being held accountable, the Supreme Court in Mitchell v Forsyth, 472 U.S. 511, 520 the Court succinctly concluded: "the Attorney General is not absolutely immune from suit for damages arising out of his allegedly unconstitutional conduct in performing his national security functions." How then can those responsible for conducting

U.S. Trustee administrative and supervisory functions related to the bankruptcy process be granted immunity from suit for restitution from unjust enrichments?

Certainly, the Supreme Court must help to identify and establish the true principles on which precedents for the administration of justice under the U. S. Constitution are to be respected, if our freedoms are to survive. George Washington wrote to James Madison on his inauguration as our first president of the United States on April 30, 1789, "it is devoutly wished on my part, that these precedents may be fixed on true principles." On May 28, 2004, President Bush is quoted as declaring in an interview with Paris Match magazine: "And now is the time to work together to promote the values we believe in, which is human rights and human dignity and rule of law and freedom and justice." The Petitioners' allegations are that "true principles" have been ignored in the handling of this case. As to the appeal, can freedom and justice prevail without integrity, responsibility and accountability?

In light of the inability of the Government to face the issues presented in the petition without grossly distorting the statutory provisions related to sovereign (and even judicial) immunity, the need for plenary review of the action below is indisputable. Indeed, Petitioners suggest that summary reversal be now in order. In the alternative, Petitioners move this Court to withdraw the filing of denial to set aside final consideration until Petitioners are allowed a reasonable time frame to gain legislative amendments to retroactively apply their rights to restitution under Title 11, U.S.C. § 11 bankruptcy and/or under current Crime Victims Rights Act legislation.

Respectfully submitted,

Richard A. Balser

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6/11/04
7/06/04

Corinne L. Balser

Corinne L. Balser,

CERTIFICATE OF PETITIONERS

The Petitioners hereby certify that this petition is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2, being the "intervening circumstances of a substantial or controlling effect or other substantial grounds not previously presented."

Richard A. Balser 6/11/04 7/6/04

Richard A. Balser, Petitioner, Pro Se

Corinne L. Balser

Corinne L. Balser, Petitioner, Pro Se